VOLUME 2

Implementing Consensus Processes in British Columbia

BRITISH COLUMBIA ROUND TABLE ON
THE ENVIRONMENT AND THE ECONOMY

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REACHING AGREEMENT:

VOLUME 2

Implementing
Consensus Processes
in British Columbia

ROUND TABLE

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1. Introduction

One of the terms of reference guiding the B.C. Round Table on the Environment and the Economy is..

> **"to recommend to Cabinet processes and mechanisms for the resolution of land use and other environment/economy conflicts and to foster the resolution of land-use and other environment/economy disputes in situations where all affected parties have agreed to submit their problems to the Round Table".**

The Dispute Resolution Core Group was formed to respond to this mandate. Its aim is to explore ways of resolving such disputes through methods based on *collaboration* and *consensus*, and to promote the application of these methods in the public domain.

The Dispute Resolution Core Group's first task was to survey the experience with consensus-based processes in government in British Columbia and elsewhere, to gain some sense of the extent of that experience and the features that made such processes succeed or fail. The result of that initial effort was published in *Reaching Agreement Volume 1: Consensus Processes in British Columbia* and its companion volume of appendices.

Reaching Agreement Volume 1 explains the terminology commonly associated with consensus-based processes, and discusses the features that are necessary to make them work. It provides a guide for assessing whether a situation is appropriate for attempting a collaborative approach to decision-making, and for establishing a consensus process. The accompanying appendices to *Reaching Agreement Volume 1* document twenty case studies where environment/economy conflicts in British Columbia were resolved through collaboration and consensus. These case studies vary in length and detail, but they point to one general conclusion - that there is considerable experience with collaborative approaches in British Columbia. However, while the concept is not new, the Core Group did conclude that the application of consensus processes could be enhanced within the government system.

In this Volume, the Dispute Resolution Core Group examines how consensus processes could be put to greater use within the current decision-making system for the environment and the economy in British Columbia.

Why are Consensus Processes Needed?

There is a critical need to rethink the current, conventional approach to decision-making in British Columbia. In Spring 1991, the Round Table held a series of public forums around the province, from which it received a strong message that people are frustrated with the way decisions are being made regarding the environment and natural resources of British Columbia. Many people perceived decision-making to be *ad hoc* and arbitrary. They saw a confusing array of planning, review, and decision-making processes that appear to be pursuing independent and often contradictory objectives. They also felt that the decision-making system as a whole is frequently unresponsive to their needs and values.

British Columbians are becoming increasingly well-informed about environmental, economic and social issues. Many question the ability of government to represent the full range of their interests and values. As a consequence, many British Columbians are demanding a more substantial role in making the decisions that affect their lives.

Another reason for rethinking the decision-making system is the escalating presence of conflict over the environment and its resources. These conflicts are aggravated by several factors. Population growth is placing greater and greater pressure on British Columbia's environment, economy, and social system. Knowledge and inventories of the province's natural resources are incomplete. Uncertainty prevails over the short and long-term impacts of human activities on natural ecosystems.

> *"If you've got a problem - share it with the people". Anonymous.*

As a consequence, traditional development activities are increasingly being confronted by the belief that biodiversity, wildlife habitat, recreational opportunities and just plain wilderness must be protected. At the same time, the need for economic and social stability is putting greater pressure on the environment. As more of these conflicts arise, government must take an approach to decision-making that involves those who have stakes in using, developing, protecting and preserving British Columbia's many natural assets.

Consensus Processes Defined

Consensus processes encompass techniques that go by a variety of names - negotiation, dispute resolution, mediation, facilitation, getting-to-yes. However, they all have a common basis in collaboration and seeking agreement. This means that consensus processes differs strikingly from other modes of decision-making, such as voting where the majority determines a decision, or adjudication where an authority makes a decision. Both of the latter modes often result in winners and losers, whereas a collaborative, consensus-based approach strives to find a common solution that can satisfy most of the needs of all parties.

Consensus means that all parties with a stake in the matter (the stakeholders) agree to a decision. However, it does not necessarily mean that the parties agree to everything about that decision; it may be more accurately translated as there being no substantial disagreement. A consensus-based decision can be characterized by the thought: "There are some things I don't like about it, but by and large, I agree with this decision". Seeing a consensus-based decision as a package to be agreed to as a whole, rather than on its individual parts, is a fundamental premise of consensus processes.

Another important element of a consensus process is the requirement for unanimity. In effect, each participant has a veto, or the ability to prevent a given outcome. This requirement is often viewed as an impractical or unreasonable test; yet it is essential in order to give all participants equal influence over a decision. Rather than being concerned with how many are "on their side", participants are motivated to consider areas of accommodation, to seek solutions that meet the interests of the other participants as well as their own, and to search for innovative solutions in order to reach closure.

In the realm of public policy, consensus processes differ from the more traditional approach of public consultation. Too often, such consultation does not occur until after objectives have been established, options identified and choices determined by government. In contrast, a collaborative approach involves stakeholders from the start in identifying and agreeing on the problem, formulating the options, and making the choices that everyone can live with.

Key Components of a Consensus Process

There are nine conditions to be met in designing and implementing an effective consensus process.

- ***A conflict:*** There must be an identifiable issue (an unresolved conflict or potential for conflict), and those affected are not satisfied with the existing decision-making processes for dealing with it. This ensures that the parties are sincerely committed to trying another approach.

- ***Incentive:*** The parties must perceive that they will be better off seeking solutions collaboratively rather than pursuing individual courses of action (such as lobbying government or publicly protesting), or leaving it to some higher authority to determine. In other words, all parties must support the consensus process.

- ***Stakeholder involvement:*** The full range of interests or stakeholders must be represented in the process. Usually two questions can pin down who the stakeholders are: who will be affected by a decision on this issue?; and who can block or undermine any agreement if they are not included in the process? Representatives of the stakeholder interests must be carefully chosen, ensuring that they are recognized principals in their respective constituencies: that they are truly responsible to those interests and can deliver decisions and commitments on the part of those constituents.

- ***Government involvement:*** Government authorities must participate to represent the broad provincial perspective, to bring public policies and legal requirements to the process, and to keep decision-makers informed of the process.

"For some people, achieving consensus is a means for balancing the pressure of powerful special interests with a method to ensure that weaker advocates have fair opportunity to influence results. For others, consensus-seeking is presented as a way to ensure that agreements when implemented are capable of standing the test of time." B. Fraser, 1991: Multi-stakeholder Involvement in Public Decision-making Processes.

"Finding agreement in a forest land use conflict is a lot like trying to herd cats. It is an elusive business which demands considerable flexibility and no small amount of creativity." C. Darling, 1991: Sustainable Process: the Cornerstone of a Jobs and Environment Accord.

- ***Accepted process rules:*** The objectives of the process, its format, and the rules and procedures by which it will operate must be agreed to by all participants as well as the governing authority.

> *"If the parties (to a consensus process) cannot agree on a procedural framework, it is unlikely that they will be able to agree on substance."*
> *B.C. Environmental Network Forest Caucus, Brief to Premier Harcourt, Oct. 29, 1991.*

- ***Time limits:*** There must be clear and reasonable time limits for reaching a conclusion and reporting on outcomes; otherwise, the process could be used as a stalling tactic by parties who perceive "no decision" as a positive outcome. On the other hand, the process must be flexible enough to allow for delays if it is clear that the process is leading to a consensus.

- ***Full mandate:*** The parties must be provided the opportunity to participate in defining the problems, identifying options, and seeking solutions rather than simply responding to the objectives or solutions selected by government.

- ***Government commitment:*** Government must be committed to responding to the outcome of the process in a timely fashion. Parties to the process must be reasonably satisfied from the outset that their agreement has a reasonable prospect of being implemented. If government cannot act on the agreement, it must be obliged to provide clear reasons to the parties involved. (This would be an unlikely outcome if government representatives are involved in the process.)

- ***Fallback:*** Finally, there must be a clear understanding that there are alternatives for making necessary decisions if an agreement is not reached. These alternatives are usually perceived to be less desirable than a decision by consensus, and therefore, provide an incentive for parties to participate sincerely in the consensus process.

While not absolutely essential, the presence of a neutral third party as a facilitator or mediator can be a major catalyst to these processes. This party would not represent any interest or be concerned with the substance of the conflict, but would be responsible solely for managing the process. The neutral party should be skilled in facilitating consensus-building by assisting the parties to define the terms and conditions under which the process will proceed. He or she would also act as a broker, if necessary, in presenting ideas and concerns of each party to the others.

Given these conditions, Box 1 outlines the basic steps in designing and implementing a consensus process. The reader is referred to *Reaching Agreement Volume 1* for further elaboration on these steps.

Consensus Processes within a Comprehensive Decision-making System

By promoting a collaborative approach to decision-making, the Round Table is by no means advocating that the parliamentary democratic model on which our government is founded be replaced by a new model based on consensus. Consensus processes are seen as supplementing parliamentary democracy. They are a way of assisting our government leaders in making better informed, more satisfactory, and more enduring decisions over contentious matters in an increasingly complex and sophisticated society.

> *"As with any other processes, consensus-based processes can - and, at times, should - fail. Where consensus fails, participants will have recourse to other alternatives for making decisions, including administrative, legal and political forums..."*
> *G. Cormick, 1991: Crafting the Language of Consensus. Negotiation Journal October 1991.*

In this context, consensus processes are seen as being only one component of a comprehensive decision-making system (Figure 1). There should also be means for dealing with matters of a *routine nature* - where the decision of a designated authority is satisfactory. Consensus processes would be reserved for more contentious matters where multiple interests may be affected.

A comprehensive system must also have means for making decisions if a consensus process fails to result in an agreed solution. In these instances, a common *fallback* is that a government authority will decide. Other fallbacks include reverting to majority rule, or referring the issue to a higher authority such as an administrative appeal board or the court. Fallbacks are necessary to provide finality to an issue. But, as noted earlier, they also provide an incentive to reach consensus. In most situations, the stakeholders would prefer to arrive at a solution themselves rather than rely on alternative means of resolution over which they have less control.

Box 1: Basic Steps in a Consensus Process

1. ***Assessing the situation:***
   (a) Determine whether a consensus approach is appropriate:
   - an identifiable issue (unresolved conflict or potential for conflict) exists.
   - all stakeholders have an incentive to deal with the issue through collaboration rather than by independent action; they support the establishment of a consensus process.
   - decision-makers in government support the process (committed to respond to the results).

   (b) If these criteria are met, initiate a consensus-based process.

2. ***Identifying the participants:***
   (a) Identify the key interests (stakeholders).
   (b) Identify the appropriate representatives of those interests.

3. ***Setting up the process:***
   (a) Gain agreement on the rules of the process - for example:
   - develop a mutually acceptable working definition of "consensus".
   - determine the structure of the process; e.g., committees, caucuses, meeting formats, presence and role of a neutral party, etc.
   - define the responsibilities of the participants; e.g., informing constituents, providing information, etc.
   - agree on protocol: e.g., confidentiality; provision of data; etc.
   - establish deadlines for reports and milestones. (A final deadline for finishing and reporting the outcome may be imposed by an external decision point.)

   (b) Determine how government will respond to the results of the process.
   (c) Clearly establish what will happen if consensus is not achieved (the "fallback").

4. ***Running the process:***
   Get the process underway following the operational rules. Apply tools and techniques to assist negotiation and consensus-building (e.g., training sessions, expert assistance) as appropriate.

5. ***Completing and reporting:***
   Report on the outcome of the process to government.

6. ***Implementing the results:***
   Any agreement should address its implementation. Support and commitment of governing agencies responsible for following up on proposals of the agreement are key to implementation.

Another component of a comprehensive decision-making system is the opportunity to *loop back* to consensus processes, even if the issue has moved on to alternate forms of decision-making (an authoritative decision, for example). Loopbacks are ways of bringing the parties back together to review the situation or deal with additional or related issues.

A comprehensive decision-making system also includes opportunities and procedures for *appealing* decisions that are considered to be unsatisfactory. Finally, it should be recognized that from time to time, people will resort to *exercising power* (strike, picket, blockade, etc.) to express their will. A comprehensive decision-making system provides methods for managing the expression of protest (e.g., rules regarding strikes and lockouts) that, among other things, prevent damage and personal injury.

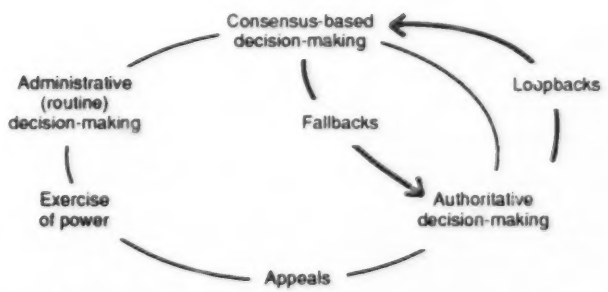


Figure 1: Components of a comprehensive decision-making system

Consensus Processes: Pros and Cons

A collaborative or consensus-based approach has some major advantages over other forms of decision-making when it comes to dealing with contentious issues.

- By encouraging parties to find common elements in their respective interests, there is a greater potential to *focus on the real interests* that are at stake, rather than on divergent opinions and

positions. This in turn *avoids hardening of positions*, a common outcome of more adversarial approaches to public involvement in decision-making.

- A collaborative approach encourages *creativity in solving problems* by bringing a diversity of knowledge and expertise together to resolve issues. In so doing, it can lead to more informed, and therefore better decisions.

- A collaborative approach can be an effective way of improving the *quality of government service* to the community by involving the public and stakeholders in land and resource use decisions, providing proof that their concerns are being addressed.

- *Greater commitment to decisions* can be engendered, in that parties are more willing to accept a decision involving trade-offs and compromises if they are involved in arriving at it.

- A consensus process also assists the establishment of *positive relations and channels of communication* among otherwise disparate interests.

These benefits can be realized even if consensus is not reached. Decision-makers will become better informed of the real issues of contention, and the parties will develop greater understanding and respect for each other's concerns and values, even if they cannot agree on ultimate solutions.

However, while consensus processes can hold these benefits, there are several concerns that have been raised and warrant consideration.

Time and Expense

A primary concern with collaborative approaches to decision-making is that they can initially be very time-consuming and costly, frustrating those who simply wish to get on with the job.

However, for issues where authoritative decisions are no longer accepted - those that are repeatedly subject to objections and public protest - the long-term environmental, economic and social costs of continuing with appeals, court cases, and public disobedience may be higher than the short-term financial costs of resolving conflicts by consensus. The time, effort and dollars spent at the front end of decision-making can be more than compensated for in the resources and relationships that are saved by reducing the number of challenges to decisions, and by gaining greater acceptance of and compliance with these decisions.

Compromising Government Authority

When consensus processes are applied in areas of public policy, there is concern that the government's mandate will be compromised; that by collaborating with stakeholders, government officials may bind themselves to the results of a consensus process, and thereby "fetter their discretion" or lose their impartiality in their decision-making roles. As such, a consensus process could be seen as an abdication of government responsibility.

In this context, the role of consensus processes within the governance system, and the role of government in these processes, must be made clear.

First, limiting an official's discretion should not be an objective of a collaborative approach. Rather, the aim is to help to find a solution to sticky issues that satisfies those who are directly affected. As such, the process should be perceived as a means of confirming the will of constituents and building a solid foundation on which to made decisions.

Second, the primary role of government in the process should be to represent the broad provincial perspective or public interest (for example, matters of fiscal restraint or an overall provincial planning context), and to ensure that statutory requirements and public policies are observed by the process and its outcome. Government representation will also ensure that the results of the process will hold no surprises for decision-makers, a factor that will greatly assist in the implementation of those results.

Third, the ultimate decision-maker (for example, a manager, director, or minister) would not participate directly in a consensus process. Staff members other than the decision-maker would be responsible for representing the government perspective and public policy in the process itself. Overseeing the process would usually be the responsibility of a neutral third party.

Finally, any agreement reached as the result of a collaborative effort should be advisory in nature. Government officials are seeking direction through consensus on the most desirable option; they retain ultimate authority in ensuring that proposed actions are consistent with the law and public policy. In return, the parties to the process might reasonably expect that so long as any agreement met applicable legal and regulatory requirements, it should be regarded favourably by government decision-makers. In these circumstances, if the decision-makers feel that the agreement cannot be approved and implemented, then they should be required to provide reasons for their decision.

Ability to Participate

While a consensus process would strive to involve all stakeholders in a given issue, some interests may not be able to participate as effectively as others. For instance, in the development of environmental regulations, individual industries may be able to marshal the resources to participate in consensus processes in their particular areas of interest, but environmental interests must often respond to numerous such processes across a spectrum of regulatory concerns. The environmental community frequently does not have sufficient staff and resources to deal with a profusion of such processes.

In these types of situations, interests with financial backing may be able to overwhelm other public interests, turning consensus processes into forums that are monopolized by interests with the money to participate. Interests with few resources may not be able to develop a solid counterbalancing argument, and feel forced to "dig in their heels", thereby thwarting the collaborative effort.

Two ways of dealing with this concern are to provide participants with adequate funding to participate, and to provide sources of neutral, commonly-accepted data and analyses.

Participant funding: Some participants may be paid to attend consensus processes as part of their jobs, whereas others are volunteers, taking time away from their employment and often paying their own way to participate. Financial assistance is warranted under such circumstances, to cover expenses involved in participating (travel, accommodation, etc.) and to partially recompense for time lost from employment.

Access to data and analyses: Some participants may have access to relevant technical information and analyses, being directly involved in its generation or use. Even if these participants make their information available, however, the other parties may wish to have it analysed to ensure objectivity, but do not have the expertise or the financial resources to carry out such analyses. These latter parties, and the whole process, would benefit from funds being available for technical support and analysis. The objective of such funding would be to review existing information and not to generate new data, unless all parties agree that such data are essential to reaching consensus.

The funds to support participants or technical expertise could be provided by the government agency sponsoring the process. Alternatively, they could come from a pooled fund to which all stakeholders might contribute some portion. A third source may be from a special fund (such as the province's Sustainable Development Fund) derived from revenues particular to the issues being addressed (e.g., surcharges on licenses or permits, or on specific commodities that are subject to regulation).

It is essential that criteria for providing this assistance be determined before commencing the process, such that all stakeholders are fully aware of the rules and procedures for such funding. For instance, the types of expenses that participant funding would cover (e.g., travel, accommodation, per diem) should be stated; the type and sources of technical or analytical expertise should also be made clear. Such criteria could be determined by government if it is the sole source of the funds, or by the consensus process as part of the design of its operational rules. For example, government could set out general conditions of funding, and the participants could negotiate the specifics of its administration and allocation.

In summary, the objective of providing participant funding and support for technical expertise is to "level the negotiating table", to enable all interests to participate effectively in consensus processes. It is not to provide an avenue for extending the process of negotiation unnecessarily, or for delaying permitting, licensing or other decisions.

This Volume

Given these basic elements of consensus processes and recognizing their benefits and limitations, we now turn to the present system of governance for natural resources and the environment. The Dispute Resolution Core Group has focused on two areas of government decision-making: the setting of environmental standards and regulations, and the issuance of environmental licenses and permits. Both of these areas experience significant conflict. Recent experience in British Columbia and in other jurisdictions (for instance, the formal regulatory negotiations used in the United States) suggests that better knowledge of consensus processes and a more systematic strategy to their implementation could benefit both areas of government activity.

These two areas of decision-making coincide with many of the administrative and regulatory responsibilities of the Ministry of Environment, Lands and Parks (MLP). The Ministry's mandate is closely linked to that of the Round Table. As such, it has been supportive of the Round Table's examination of areas of decision-making that fall within its purview. However, it is not the intention of this paper to direct its proposals solely to MLP; collaborative approaches could be applied by any government agency in many decision-making contexts.

2. Developing Environmental Regulations: The Potential for a Consensus-based Approach

Regulatory Negotiation, or "Reg-Neg"

The setting of standards and regulations in Canada has traditionally been the prerogative of government regulatory agencies. Consultation with stakeholders is usually ad hoc and informal, occurring at the discretion of these agencies rather than as a legal or administrative requirement.

It is becoming increasingly apparent, however, that the involvement of stakeholders in regulation-making is an essential ingredient in obtaining the support and cooperation needed to effectively implement them. In the United States, for instance, public demands to be involved in developing regulatory policy and a strong litigative tradition have acted as major obstacles to implementing government regulations. Frequently, formal issuance of a regulation has not concluded the regulation-making process, but has simply acted as the opening round in a protracted court case. For example, through the 1970s and 80s, about 80% of regulations published by the United States Environmental Protection Agency's were challenged in court (Pritzker and Dalton, 1990).

Given this adversarial environment, regulatory negotiation, or "reg-neg" as it has become popularly known, has emerged as an alternative to traditional, internal procedures for drafting standards and regulations in the United States. It is based on the premise that in many situations, it is possible to bring together representatives of the regulating agency and the interest groups that are affected to participate in the drafting of a proposed rule. The benefit of the approach is that if these parties do achieve a consensus, the resulting rule will likely be easier to implement in two respects: it will have the support of the regulated community and other concerned interests; and issues regarding realistic implementation will already have been taken into account. Even if consensus is not reached, the identification of key issues, uncertainties and points of contention provides valuable information to the regulatory agency in finally establishing the rule.

While there is no similar litigation tradition in British Columbia, the fact remains that regulations in the environmental area are increasing in number and complexity, and a greater number of informed public and corporate entities have a strong interest in their content and implementation. At times, political rather than legal challenges to new regulations have led to significantly weakened standards or abandoned proposals. Noncompliance with regulations has been the norm in some sectors, attributed in part to a lack of understanding of or support for the regulation by affected parties. Noncompliance is a subject of growing concern for government officials, and a source of frustration and anger among some sectors of the public. These factors provide strong arguments for trying a reg-neg approach in British Columbia.

The Regulatory Negotiation Process: Lessons from the United States

The following discussion is based on the *Negotiated Rulemaking Sourcebook* published by the Administrative Conference of the United States (Pritzker and Dalton, 1990).

Basic Steps

Negotiated rule-making has been used in the United States in a variety of situations over the last 10 years (Box 2). That experience has led to the identification of criteria for judging when to use negotiated rule-making (Box 3). The process as it is applied in the United States federal system is summarized in the following steps.

- *Convening the process:* This includes evaluating the feasibility of negotiating a regulation, identifying the interests, designing the structure of a negotiating committee, and identifying the preliminary set of issues to be negotiated. Usually a "convenor" is appointed by the agency to carry out these tasks and discuss them with the agency. With the help of the convenor, the agency determines whether the regulatory negotiations should proceed. If the decision is affirmative, the final task is to obtain formal commitments from the interest groups to participate in the negotiations.

- *Orienting the participants:* One-day pre-negotiation training sessions have become common, and provide a chance for the participants to come together in an informal, educational setting and help to level the playing field with respect to negotiation skills and understanding of the process.

- *The negotiations:* The design of the negotiation phase and the negotiations themselves must consider a number of key features: establishing a common definition of consensus, the nature of agency coordination and participation, issue selection, committee resources, public notices, scheduling, recording and communication, the use of caucuses and sub-committees, who will manage the meetings (whether an experienced facilitator or mediator will be used), and the establishment of deadlines (originating from the agency or the negotiation committee). Some of these features should be determined ahead of time by the agency with the help of the convenor, while others are best left to the negotiating committee itself.

- *Concluding the negotiations:* The reg-neg process is concluded when the negotiating group reaches consensus on the issues or when it decides that consensus cannot be reached on all or parts of the regulation. It submits its findings to the regulatory agency. What the agency does with the results depends in part on the prior understanding that was reached between the agency and the negotiating group as well as on the results that the negotiating committee transmits to the agency. The results of the process may be in the form of a draft regulation which the agency can then submit for internal and public review, or they may in the form of recommendations on the issues, leaving the agency staff to draft the regulation on the basis of those recommendations. In all cases, the agency is responsible for ensuring that the proposed regulation or recommendations are consistent with statutory requirements.

Box 2: Examples of negotiated rule-making by federal and state authorities in the U.S.

(Dept. of Transportation)
Flight time limitations and rest requirements
Nondiscrimination on the basis of handicap in air travel
Uniform system for handicapped parking

(Environmental Protection Agency)
Nonconformance penalties under the Clean Air Act
Emergency pesticide exemptions
Worker protection standards for agricultural pesticides
Performance standards for woodburning stoves
Resource Conservation and Recovery Act permit changes
Underground injection of hazardous wastes
Control of volatile organic chemical equipment leaks

(Dept. of Labour)
Occupational exposure to benzene; 4,4'-Methylenedianiline

(Dept. of the Interior)
Air quality regulations for oil exploration and development on the California outer continental shelf

(Dept. of Agriculture)
Standards to prevent interstate spread of varroa mites

(Arizona) Groundwater standards

(Colorado) Public Utilities Commission resource planning

(New Mexico) Underground petroleum storage tanks rule

(Virginia) Well drilling standards; groundwater standards

(Washington) Bald eagle nesting site protection standards

(Idaho) Water anti-degradation policy

Statutory and Administrative Basis

At the federal level in the United States, negotiated rule-making has its statutory basis in the Administrative Procedure Act. That Act sets forth the basic requirements for virtually all rule-making: notice of proposed rule-making in the Federal Register; opportunity for review or participation by interested parties; final publication of the rule and its effective date. The Act covers all rule-making except for military or foreign affairs functions and matters relating to agency management or personnel.

Other statutes have added procedural requirements affecting the programs of particular agencies, usually aimed at improving the way in which agencies obtain and use information or the participation of interested parties. For instance, it has become standard practice to charter the negotiating committees in accordance with the

Box 3: Criteria for applying negotiated rule-making.

- A limited number of interests are significantly affected, and individuals can be selected to represent them.
- The issues are known.
- No party will have to compromise a fundamental value.
- The proposed rule involves diverse issues.
- The outcome is genuinely in doubt.
- The parties view it as in their best interest to use the process.
- The regulatory agency is willing to use the process and participate in it.
- No one interest is able to dominate the proceedings or eventual consensus.
- There is a deadline for achieving consensus.
- It is clear that in the absence of a consensus, the rule will still be developed and established by the regulating agency.

Federal Advisory Committee Act, which provides uniform standards for the operation of advisory committees within the executive branch of the federal government, and assures public access to their deliberations.[1]

Negotiated rule-making processes have been initiated in the United States by proposals originating from agency staff, affected parties, or by congressional direction. At the federal level, only one agency in the United States has institutionalized reg-neg. The Environmental Protection Agency's Regulatory Negotiation Project in the Office of Policy, Planning and Evaluation evaluates rules under development for possible reg-neg, and provides assistance to rule-making offices in establishing procedures. Institutes or agencies have been established in a variety of states to mediate environmental issues, and are available to assist in convening of facilitating reg-neg efforts.

In essence, negotiated rule-making has not become a substitute for traditional public standard-setting procedures in the United States. Rather, it has been developed as a supplement to the rule-making procedures prescribed by the Administrative Procedure Act, by inserting a negotiative seeking structure into the rule-making process at the drafting stage, before the agency has formulated its own position. The function of a negotiating committee is to try to reach a consensus on the text of a proposed regulation. The agency is required to give notice of the proposed rule-making process, and to issue the draft regulation that is produced for public comment. So long as the agency complies with notice and comment requirements and retains discretion over the content of the final rule, it is in compliance with the Act (Pritzker, 1990). The regulatory agency has ultimate authority in ensuring that the proposed rules are consistent with statutory requirements.

Advantages of a Reg-neg Process

There are aspects of negotiated rule-making that generate concerns among observers of public process. These include the issues considered in chapter 1: the additional time, resources and effort involved in a collaborative approach; the perception of loss of government authority and objectivity; and the ability for all participants to participate on an equal basis.

Assuming that these concerns can be addressed satisfactorily using the measures suggested in chapter 1, a reg-neg approach has potentially significant benefits in the development of regulations and standards.

- Government is not the sole repository of knowledge and expertise relevant to regulatory matters. Through reg-neg, expertise from a variety of sources can be brought together in a problem-solving setting to affirm the practicality of proposed regulatory measures and to generate new or better ones.

- From government's perspective, consensus-based regulations can generate the much needed support for government policy that will provide greater likelihood of voluntary compliance.

- From industry's perspective, consensus-based regulations can address their implementation concerns and the practicalities of compliance.

- From the perspective of nongovernmental organizations, consensus-based regulations can mean direct input to the content of regulations and access to decision-makers.

- From the perspective of all stakeholders, consensus-based regulations can mean greater certainty in both the process used to develop the regulations and in the substance of the regulations themselves. Regulatory negotiation can lead to better decisions in the interest of sustaining the environment, the economy and the social fabric of British Columbia.

Regulatory Negotiation in British Columbia

While it is argued that British Columbia could benefit from the negotiated rule-making approach being used in the

[1] This aspect of the Federal Advisory Committee Act caused some concern among mediators who contended that successful negotiations often depend on sensitive discussions among members or sub-groups; to require that all discussions be deemed "meetings" and subject to public scrutiny could doom a reg-neg process. However, it has since been concluded that the Act does not prevent the meeting in private of caucuses and working sub-groups to exchange views, identify issues and explore alternatives, so long as these sub-groups are not formulating the definitive decisions regarding the advice of the whole committee (Pritzker and Dalton, 1990).

United States, it is also important to realize that there are some important differences in the administrative and legal frameworks governing the establishment of regulations in the United States and Canada.

Differences with the United States

As mentioned earlier, the litigious history of regulation-making in the United States, which stimulated the search for alternative ways to setting rules, is largely absent in Canada. The United States courts have traditionally taken a strongly interventionist role in regulatory matters, compared to Canada. By comparison, both federal and provincial executive (cabinet) levels in Canada have greater freedom to act, and are significantly less constrained by the courts and legislatures than in the United States. In addition, legislation in the United States calling for regulations tends to be more explicit as to their need and content than similar legislation in Canada. This legislative commitment tends to remove any question regarding whether there will be a regulation; the debate focuses instead on what the regulation will contain and how it will be administered. Furthermore, public and legislative debate of regulations tends to be more rigorous in the United States, where it plays a critical role in defining issues, informing the public, mobilizing stakeholders and identifying interests and representatives who would participate in the reg-neg process (Dorcey and Riek, 1987; G. Cormick, personal communication).

As a consequence, there may be less legislative imperative and litigious motivation in Canada than in the United States to introduce a collaborative approach to regulation setting. However, there is sufficient dissension over regulations at political levels in Canada to justify trying a reg-neg approach. In British Columbia, it is desirable to avoid the type of adversarial rule-making that led to the litigious history of the United States; to find "a better way" of developing regulations and standards that is applicable to the British Columbia experience.

Current Examples of Regulatory Negotiation

Canada: Consensus-based processes are gaining a foothold in Canada with respect to environmental management and conflict resolution. Examples of the negotiation of site-specific "standards" are growing in number. For instance, in their paper studying the use of negotiation in settling environmental disputes, Dorcey and Riek (1987) analyse 24 negotiative situations across the country. Approximately half of these situations dealt with terms and conditions for development projects, including the siting of landfills, sewage lagoon expansions, oils sand operations, and rail line construction. All involved a provincial or federal regulatory agency, a project proponent, and usually a representative of the community or interest that would be affected, such as community residents, Indian bands, or a union.

British Columbia: In British Columbia, the Dispute Resolution Core Group found several examples of project-specific negotiations, which are documented in Appendix 1 of *Reaching Agreement Volume 1*. These examples include: the review of the access road into the Golden Bear mine which involved negotiations among the mining companies, provincial and federal government agencies and the Tahltan Tribal Council; and the Bridgeport Harbour Market Development and the Deering Island development in the Fraser River estuary in which the Department of Fisheries and Oceans negotiated the protection of critical fish habitat with developers and the North Fraser Harbour Commission.

The use of negotiation to establish general standards or regulations that would apply more widely does not as yet appear to be prominent, but there are a few examples in British Columbia For instance, following the development projects in the Fraser River estuary mentioned above, negotiations between the Dept. of Fisheries and Oceans and the North Fraser Harbour Commission resulted in the establishment of a regulatory zoning scheme for the north arm of the Fraser - in essence, a simple set of regulations designed to protect fish habitat from further loss to development. More recently, negotiations leading to the establishment of a regulation regarding the use of sapstain control products[2] provide a more explicit example of reg-neg (this situation is profiled in Appendix 2 of *Reaching Agreement Volume 1*).

The development of the Health, Safety and Reclamation Code for Mines under the provincial Mines Act (1989) has been cited by representatives in government and the mining industry as a successful example of negotiated regula-

[2] Sapstain refers to any discoloration in wood caused by chemical reactions (e.g., when green sapwood is exposed to air, causing oxidizing enzymes to discolour the wood), moulds or fungi. Such staining does not reduce the strength of wood for most purposes, but greatly reduces its value. Chemicals used to control sapstain, however, are hazardous to both human health and the environment, necessitating their strict regulation.

tion-making in British Columbia. About 60 people from industry, labour, academia, and the Ministry of Energy, Mines and Petroleum Resources participated over a 2-year period, led by a nine-member Steering Committee and 12 subcommittees. These committees produced a three-inch-thick draft document that was circulated to about 300 people. Comments were received, reviewed and final changes determined by the Steering Committee. Consensus was reached on all but a half-dozen points - a significant feat considering the thousands of rules that are contained in the Code (letter from the Chief Inspector of Mines, October 16, 1991).

The Code has been in place since 1990. There appears to considerable interest from other jurisdictions in its development, as well as a strong sense of ownership and pride in the Code: labour unions have sent it to mining locals all over North America as a piece of model legislation, and one company has had it translated for use in the USSR (*ibid.*).

Further Applications in British Columbia

There are many potential avenues for exploring the application of reg-neg in setting standards and regulations in British Columbia The following are three examples from programs administered by the Ministry of Environment, Lands and Parks and the Ministry of Forests.

Objectives for pollution control

The Ministry of Environment, Lands and Parks (MLP) uses a variety of terms to describe the criteria it applies in regulating resource use, discharges, or other activities that might affect the environment (Box 4). None have been given legislative status; they are enforceable only to the extent that they guide or are incorporated into the terms and conditions of waste management permits. (The major exception are "criteria" set forth in the Special Waste Regulation under the Waste Management Act; as such they can be considered to be "standards").

Of these non-legislated criteria and objectives, of particular interest are the "pollution control objectives" that were established during the 1970s. Under a process initiated by the then Pollution Control Board, objectives were established for five sectors:

- Forest Products Industry (1971, updated 1977).
- Chemical and Petroleum Industries (1974).
- Mining, Smelting, and Related Industries (1973, replaced 1979).
- Food Processing, Agriculturally Oriented and Other Miscellaneous Industries (1975).
- Municipal Type Discharges (1975).

These objectives set forth effluent limits for discharges to water, land and air in the form of ranges of concentrations of various substances, stating that "the more stringent values will apply to sensitive environmental situations, the less stringent where it can be shown that unacceptably deleterious changes will not follow". The pollution control objectives were established to serve as guidelines in setting limits in waste management permits. It was originally intended that they would be reviewed and revised every five years, but this has not occurred. With advances in technology and improved knowledge, most are now considered to be outdated.[3]

MLP is considering a review of the objectives, revamping them as "discharge criteria" which would be based on assessments of the scientific and technical literature, treatment technology and criteria used by other jurisdictions. Whenever possible, discharge criteria would be harmonized with national criteria. The involvement of affected interests (other regulatory agencies, applicable industry and labour organizations, environmental organizations) as each type of discharge operation is addressed could prove very useful in compiling information, practical knowledge and general support for the criteria, as well as in affirming their practicality. In addition, there may be certain types of discharges (for instance, ones that are particularly harmful) for which MLP wishes to establish legislated standards.

Agricultural practice

Present regulation under the Waste Management Act exempts farm operations from requiring waste management permits for "traditional" farm practices. However, these practices have come under increasing fire because of perceived effects on land and water environments. An Agricultural Waste Committee was formed in 1988 to address the

[3] An exception are the pollution control objectives for the Forest Products Industry, which have been largely superceded by the Pulp Mill Effluent Regulation passed in 1991.

lack of standards for agricultural practices that affect discharges to land and water. The Committee is comprised of representatives from the MLP, Ministry of Agriculture and Fisheries, British Columbia Federation of Agriculture, Regional Districts and Dept. of Fisheries and Oceans. The Committee's approach has been to develop an Agricultural Waste Control Regulation and a supplementary "Code of Agricultural Practice for Waste Management". Farmers would be required to meet the Code's standards in order to remain exempt from requiring a permit.

Meetings were held with farm organizations for input into a draft Code. The Regulation and code were anticipated to be approved by the spring of 1991. It would be useful to examine this process for its similarity to a negotiative situation, and assess whether future processes could benefit from a more formalized reg-neg approach.

Forestry practice

The Ministry of Forests (MOF) has recently released a public discussion paper towards formulating a Forest Practices Code (British Columbia Ministry of Forests, 1991). The paper provides a definition and purposes for a Code, and presents principles, elements and options for implementation. The Ministry asks for public input on a variety of matters related to the formulation and content of the Code, including an effective process for its development.

The Round Table suggests a reg-neg approach that brings together representatives from major stakeholder interests to help determine the content of a Forest Practices Code. The process could be organized as a series of reg-neg procedures with different sets of stakeholders, each dealing with the major forestry-related activities being contemplated (e.g., access development, timber harvest, range management, recreation management, etc.). Alternatively, it could be convened as one process with one comprehensive group of stakeholder interests, with committees formed to deal with each of these activities. The results of the reg-neg process, draft elements of the code, would be subject to general public scrutiny before being presented in final form as recommendations to the Ministry. The Core Group would like to discuss this approach to Code development with the Ministry.

Box 4: Terms pertaining to environmental objectives as used by the Ministry of Environment.

Ambient criteria: maximum levels of contaminants that are considered to be safe in maintaining the environment for specific uses, such as drinking water, aquatic life, agriculture, recreation and industrial use. Criteria are applicable province-wide and have been established for water (about 12 contaminants) and soil (100 contaminants); air quality criteria are being developed in conjunction with a national program under the auspices of the Canadian Council of Ministers of the Environment.

Ambient objectives: criteria adapted to protect the most sensitive designated use in a specific geographical area or water body; designed to provide measurable targets of environmental quality taking local circumstances into account. Objectives have been developed for 24 water bodies; about 100 land (soil) sites.

Permit limits: "characteristics of discharge"; the legally enforceable limits set out in waste management permits issued under the Waste Management Act.

Standards: maximum acceptable levels of contaminants allowed in a discharge or emission; often expressed as ranges or loadings based on "best available technology"; are legally enforceable. The only "standards" as such in B.C. are set forth in the Special Waste Regulation issued under the Waste Management Act which lists levels that must be met in emissions from special waste treatment facilities.

Sources: Ministry of Environment. 1990. Criteria and Objectives for Water, Air, Soil and Discharges and their Link to Waste Management Permits. 27 p. L.T. Hubbard. 1990. Emerging Water Quality Management Strategies in British Columbia. 14 p.

Conclusions

There are still questions that require further exploration when considering negotiated rulemaking in British Columbia. For instance, in the areas of resource management where it might be most applicable, statutory constraints to using reg-neg need to be identified and legislative measures that would provide the basis and incentive to use reg-neg need to be determined. Whether non-governmental interests - industry, environmental and labour - are sufficiently organized to participate in a meaningful way in negotiated rulemaking would have to be assessed on a case-by-case basis. And whether there is general public acceptance of such an approach would also need examination for individual situations.

Nonetheless, besides the areas in resource management suggested in this chapter, there are likely many more (e.g., pesticides control, product packaging, transportation corridors, wildlife harvesting, aquaculture) where regulations, standards of operation, and regulatory policies are being developed or revised in which a reg-neg approach might be appropriate. The Round Table would appreciate your help in identifying and examining these other possible areas.

3. Consensus Processes in Environmental Permitting and Licensing

Current Licensing and Permitting Procedures

A variety of environmental statutes authorize certain government officials to issue permits or licences as a means of allocating scarce resources and regulating activities that may affect the environment, other resource users, or public safety. A typical licensing or permitting process under these statutes involves the following steps:

- the submission of an application to a regional office of the authorizing agency;
- review by that agency, usually in consultation with other agencies whose mandates are affected;
- public notice of the application with some opportunity for response by concerned parties;
- a decision by a regional authority allowing or denying the activity being applied for; a permit, licence or other form of authorization is usually issued with restricting terms and conditions.

The right to appeal decisions of regional officials to a higher authority is also a common feature of permitting and licensing procedures. In British Columbia, the Environmental Appeal Board was established under the Environment Management Act to hear appeals under five statutes, summarized in Table 1. Board members (presently 21) are appointed by Cabinet from a range of technical and professional backgrounds. The Board hears appeals in accordance with the requirements of the Environment Management Act, the five acts under its purview, and the rules of "natural justice"; their powers under these acts are summarized in Table 2. In most cases, the Board can confirm, reverse or vary the decision being appealed, or make another order that it considers appropriate. (Only the Wildlife Act varies from this pattern by restricting the Board to either dismissing the appeal or sending the matter back to the official with "directions"; any final revision of a decision is still left to the official.)

Under three of the environmental statutes (the Waste Management Act, Water Act, and Wildlife Act), appealing a regional official's decision is a two-stage process. A decision of a regional manager can be appealed to the director of the applicable program at the central office in Victoria; a director can hold hearings and can generally rule in any way on the matter under appeal. If a director's decision is still unsatisfactory, it can then be appealed to the Environmental Appeal Board. In contrast, all appeals under the Pesticides Control Act and the Commercial River Rafting Safety Act go directly to the Board.

A Collaborative Approach to Licensing and Permitting

A collaborative approach takes on special meaning in this context, as the issuance of a permit or licence is often not a simple yes-or-no matter. Increasing competition for scarce resources, conflicting values, and uncertainties regarding the state of the resource or the possible effects of a proposed use are common factors in such decisions. Government officials must often use discretion and best judgement in determining whether a proposed resource use should be allowed, and the restrictions that should be placed on that use. It is becoming more and more apparent, however, that members of the public want to be involved in making these kinds of decisions when their interests are directly affected. Collaborative approaches are needed to meet these demands.

A collaborative approach may be particularly helpful in interjurisdictional situations; for example, where a municipality is applying for or renewing a waste management permit from the provincial government, or where one provincial agency is seeking a licence from another. Conflicts between applying and authorizing agencies could be handled more expeditiously, with less rancour and with less expenditure of public funds through a collaborative forum.

Applying collaborative approaches in permitting and licensing situations is not a new idea. *Reaching Agreement Volume 1* describes instances where collaborative methods are already being applied by resource managers in permitting and licensing situations in the province. For example, case 17 in Appendix 1 of *Reaching Agreement Volume 1* describes the types of conflicts that managers of Crown land deal with on a regular basis over land use. As these examples illustrate, a collaborative approach to licensing and permitting makes good sense for a number of reasons:

Table 1: Permits, licences, etc. under five environmental statutes

Act	Licence/Permit/etc.	Activity Allowed	Official
Pesticides Control Act	Licence	- carry on business of selling, applying or providing any service respecting pesticide	Administrator (designated by Minister)
	Certificate	- sell or apply pesticide	"
	Permits: general application, special use, restricted pesticide use	- apply pesticide to public land or water body or private land use for forestry	"
Waste Management Act	Waste management permit	- discharge waste	Regional waste manager
	Special waste permit	- store or transport special wastes	"
	Approval	- discharge waste or store special waste for 1 year	"
	Waste management plan	- discharge of waste by a municipality	Minister
	Variance order	- temporary relief from requirements of permit, etc.	Minister
Water Act	Water licence	- divert, beneficially use water	Regional water manager, Comptroller
	Approval	- use water for 6 months	"
	Permit (land)	- flood Crown land; construct or operate licensed works on land	Minister

Continued . . .

Table 1 (continued)

Act	Licence/Permit/etc.	Activity Allowed	Official
Wildlife Act	Licences (recreational): fishing, hunting, firearms	(self explanatory)	Commercial vendor
	Authorization	- hunt in limited entry area	Director, Wildlife
	Permit	- do anything that is otherwise prohibited by Act; omit doing anything otherwise required by Act	Regional wildlife manager
	Licence (commercial): fur trading, trapping	(self explanatory)	"
	Permit (commercial)	- import, export wildlife parts, eggs, etc.; traffic in live wildlife, meat.	
	Registration of trapline	- exclusive right to trap in area specified	
	Licences: guide outfitter, assistant guide outfitter, angling guide	- act as a guide (for compensation)	"
	Guide outfitters certificate	- exclusive right to guide in area specified	"
	Permit	- licensed resident hunter may accompany a nonresident to hunt big game - licensed guide outfitter may guide in area other than area endorsed in licence	"
Commercial River Rafting Safety Act	Registration	- act as an outfitter	Registrar
	Licence: guide, trip leader	- guide or lead trips	"
	Permit	- operate on a specific river	"
All statutes	Suspension or cancellation of licence, permit, etc.	(self explanatory)	Manager, senior manager

Table 2: Provisions for Appeal under the Five Environmental Statutes

Act	Levels of Appeal	Time Allowed for Appeal	What Can Be Appealed	Who Can Appeal	Powers of EAB*	No. of Appeals (1989-90)
Commercial River Rafting Act s.6	Decision of registrar to the Board	Not indicated	Suspension or cancellation of registration, licence or permit. Refusal to register or issue a licence	Applicant.	Confirm, reverse or vary decision of Registrar	0
Pesticides Control Act s.15; Regs.	Decision of administrator to EAB	30 days from the date of the action, decision or order	Action, decision or order of administrator or of any other person under Act	Any person	Made an order it considers appropriate	41 brought; 27 heard
Waste Management Act s.26-30	Decision of manager to director. Decision of director to EAB.	21 days after notice of decision; Board may extend time limit	Any decision made by a Director or District Director	Person aggrieved by decision	Confirm, vary, or reverse decision; make any decision that manager or director could make	5 brought; 3 heard
Water Act s.38-39	Decision of engineer to comptroller. Decision of comptroller to EAB. (To cancel licence: Comptroller's decision to Supreme Court)	30 days from the date of the order	Any decision or direction except licence cancellation	Licensee, license applicant or riparian owner who considers his/her rights would be prejudiced by proposed use	Make any order deemed just	15 brought; 8 heard
Wildlife Act s.103	Decision of manager to director. Director's decision to EAB	30 days after day the per son is served, or deemed to have been served with notice of decision	Any decision affecting a licence, permit, registration of trapline, outfitter's certificate or any application Any decision made on an appeal.	Person aggrieved by decision	Dismiss appeal or send matter back to regional manager or director with directions	12 brought; 9 heard
Environment Management Act s.11-13	EAB-> Cabinet	As stated in each statute	As stated in each statute	As stated in each statute	Powers under ss.12, 15, 16 of Inquiry Act	—

*EAB = Environmental Appeal Board

- There are better prospects for "keeping the peace" in the long term if the parties can sort out their differences at the local level in a collaborative fashion, rather than have a decision imposed by a central, adjudicating authority.

- A collaborative approach can help to minimize the time and resources spent on dealing with conflicts over resource allocations. The added costs of consensus-building at the front end of decision-making can be offset by cost reductions resulting from fewer appeals and improved voluntary compliance with permits and licenses.

- Collaborative approaches can be an effective way of improving the quality of government service to the community by involving the public and stakeholders in local land and resource use decisions, providing proof that their concerns are being addressed.

- Collaborative approaches can help to effect appropriate decentralization of decision-making, removing unnecessary central intervention and making regional managers more accountable for decisions.

It is for these reasons that this chapter examines permitting and licensing as an area where collaborative processes could be put to good use. It focuses on the five environmental statutes summarized in Tables 1 and 2. The essential elements of a collaborative approach to permitting and licensing are proposed, many of which already exist under the environmental statutes being examined; all that is needed, in many cases, is to re-organize or strengthen these elements into an effective and comprehensive system for managing conflicts in licensing and permitting.

Although all but one (the Commercial River Rafting Safety Act) are administered by the Ministry of Environment, Lands and Parks (MLP), these statutes are being used chiefly to illustrate specific elements of a collaborative approach. It is not the intention to direct proposals solely at MLP, as a collaborative approach could be applied to licensing/permitting procedures of any government agency in many allocation and regulatory contexts.

It is also emphasized that a collaborative approach is not necessary or appropriate for all licensing or permitting situations. Applications involving little or no conflict with other resource uses are dealt with most expeditiously through the normal procedures administered by regional authorities. More contentious applications are the principal focus of the collaborative approach suggested here.

Collaborative approaches are not a panacea for all conflicts over licensing or permitting decisions. As chapter 1 describes, consensus processes are just one component of a comprehensive decision-making and conflict management system, one which emphasizes timely collaborative measures, but also includes other means of reaching decisions when collaborative approaches are unnecessary, inappropriate, or unsuccessful. It also includes means for appealing decisions. All of these requirements are addressed in the following discussion of a collaborative approach to licensing and permitting.

General Principles of a Collaborative Approach

Before looking at the major elements, there are a few key principles on which licensing/permitting processes should be premised in order to take full advantage of a collaborative approach:

- *Open decision-making:* The criteria under which an official operates in exercising his/her legislated powers should be clear to all parties affected by the decision. For example, applicants and the public should know, or be able to find out, the circumstances in which an official can or cannot issue a permit or licence. The information on which decisions are based should also be accessible to all concerned parties.

- *Notice:* The public should be informed of any application for or issuance of a permit/licence that would affect the environment in which they live.

- *Participation:* There should be an opportunity for the public to make representations and to participate in decisions respecting licences/permits.

- *Early opportunity for collaboration:* There should be opportunities for collaboration as early as possible in permitting/licensing procedures; but there should also be opportunities and encouragement to apply collaborative approaches at later stages, if needed.

- *Final determination:* There should be access to a process to make a final determination if consensus is not possible within a reasonable time period.

It is also a basic principle of democratic decision-making that legislated responsibilities of designated officials should not be compromised. Limiting officials' discretion in carrying out legislated responsibilities is not an objective of a collaborative approach; rather, it is aimed at helping to resolve issues that officials may encounter in carrying out their mandates.

Steps in a Permitting/Licensing Process

Bearing these principles in mind, the following generic permitting/licensing process is suggested as the means of providing ample opportunity for collaborative processes, and final adjudication if consensus is not possible. For each step of the process, the basic objective is described, followed by illustrative language (in boldface) that would provide for the implementation of that step in a policy or procedure document. Examples where each step already exists in the five environmental statutes are indicated in accompanying boxes and referred to in the text.

1. Notice of application

To increase the likelihood of public input at an early stage, there must be appropriate notice of an application for a licence or permit.

> **Upon submission of an application for a licence or permit, the official or applicant should notify the public by an appropriate measure, such as publishing a notice in local newspapers or by posting notices on and around the site of interest.**

Notice of application is required under three of the environmental statutes (Box 5). Requirements range from notifying other users whose rights may be affected (the Water Regulation), to posting copies of the application at the proposed site of use (Waste Management Regulation and Water Regulation), to publishing notices in local newspapers (mandatory under the Pesticide Control Act Regulation, discretionary under the Water and Waste Management Regulation).

These statutes support the principle of this step, but they illustrate a variety of notification formats as well as differences in what is mandatory vs. discretionary. Differences in the types of decisions being made, in terms of the nature of individual rights that may be affected, may justify different approaches to public notice. Nonetheless, it may be desirable to have at least one means of public notification that is common to all statutes.

Box 5: Examples of notice requirements.

Pesticide Control Act Regulation (s.16): applicants must publish a notice in a local newspaper within 45 days of being issued an application number. The content of the notice, even typeface and minimum size, are specified.

Water Regulation (s.3): notice of an application shall be given to any current water licensee, other applicant, or riparian owner whose rights or property may be affected, or to any other party whose input may be required by the regional manager or comptroller. The applicant may also be required to post the application at specific locations or in a local newspaper.

Waste Management Regulation (s.2): regional waste manager must determine whether an application for a permit is of a "minor" or "major" nature. If major, the applicant must post the application at the proposed site, and may also be required to display a copy in local newspapers, post offices, and/or serve a copy on a person who the manager deems may be adversely affected. The manager is responsible for publishing a copy in the B.C. Gazette.

One possibility is a province-wide Environmental Registry in which applications of all types and their resulting decisions are recorded. The Registry could be a computerized system in which all regional offices would enter and update information on proposed and licensed activities. It could be accessed, on a read-only basis, through the province's public library system or government agents' offices, providing the public with immediate access to information on proposed projects, applications, status of permits and licences, and so on. In this way, a citizen or organization could stay abreast of proposed and ongoing activities in a particular geographical area or topic of interest. (It is worth noting that an Environmental Registry of this type has apparently been established in Manitoba with success.)

Public notification through this type of Registry could be made mandatory under all the environmental statutes.

Other, more specific forms of notice could be discretionary, taking into account the particular nature and circumstances of a given application.

2. Opportunity for participation

The opportunity to provide relevant information or voice a concern should be available, with direction to exercise that right at the earliest point in time.

> **Anyone objecting to the application or wishing to provide relevant information should have an opportunity to file the information or objection in writing with the official and the applicant within a specified time period. Under extenuating circumstances, the official should be able to consider information submitted beyond the specified time period.**

Examples of statutory provisions are again found in the five environmental statutes (Box 6). The basic premise here is that concerned parties have both the right and the responsibility to raise concerns at the earliest stage possible. This will help to prevent unnecessary delays to resolving any disputes, and will reinforce the early opportunity for a collaborative solution. However, there may also be circumstances where parties should still be able to bring forward information at a later date, as is recognized under the Water Regulation.

There are some differences in how the statutes define the opportunity to participate. For instance, only persons adversely affected by the application can participate under the Waste Management and Water Regulations, whereas the Pesticides Control Act Regulation permits a broader range of information and interests to be presented. In addition, the Waste Management and Water Regulations direct parties to make submissions only to the managers, whereas the Pesticides Control Act Regulation requires the concerned party to submit information to the applicant as well.

In general, the model presented by the Pesticides Control Act and Regulation is the most useful, both in recognizing the potential benefits of public input and in placing the responsibility on potential intervenors to inform both government authorities and the applicant of their concerns.

3. Response to concerns or objections

The concerns raised by objectors to the application should be addressed before the official deliberates on the application.

> **The onus should be on the applicant initially to respond to any information provided or objections raised by members of the public. The applicant should respond directly to the party, and should also indicate to the official how the concerns would be dealt with.**

The environmental statutes direct the relevant officials to take into account any objections that are filed when making a decision. However, regulations pursuant to two of the statutes contemplate the applicant responding to such objections (Box 7). The Pesticide Control Act Regulation explicitly requires the applicant to show how he/she will respond to information provided by other parties. While not required under the Regulation, applicants are encouraged by the Pesticides Control of MLP to meet with potential objectors. The number of appeals of permits have been substantially reduced since the Regulation was amended to incorporate this requirement and the Branch adopted this policy (D. Cronin, Pesticide Control Branch, personal communication). The Waste Management Regulation permits a manager to require an applicant to meet with a party who may be adversely affected.

Box 6: Examples of participation opportunities.

Waste Management Regulation (s.5): any person who may be "adversely affected" by the granting of a permit can notify a manager in writing within 30 days of an application being published, stating how he/she will be affected.

Pesticides Control Act Regulation (s.16(5)): any person who has information that may be useful in the evaluation of the application must submit that information in writing to the regional manager and to the applicant within 30 days.

Water Regulation (s.3(4)): allows 30 days for filing of objections. Also allows persons who can prove to the regional manager that they were not given notice of the application in time to meet this deadline to file an objection any time before the licence is issued.

In summary, the applicant should be made responsible for finding out the basis of objections or concerns regarding the application, and providing the intervening party and the official with a meaningful response to them.

Box 7: Examples of response to objections.

Water Act (s.9): the comptroller or regional manager may decide whether a hearing is warranted based on the objections filed.

Pesticide Control Act Regulation (s.16(6)): within 60 days of the application, the applicant must submit to the regional manager a statement describing the action proposed to respond to any information provided by other parties.

Waste Management Regulation (s.6): an applicant may be required to meet with a party who may be adversely affected "to explain and clarify the intent of the application and to describe the discharge or storage and its potential effect on the receiving environment".

4. Pre-decision collaboration

In some instances where objections to an application exist, the parties may not be comfortable communicating directly with each other; they may feel intimidated by the other party or there may be a poor relationship between the parties. Access to a facilitator may increase the possibility of the parties resolving objections to the application.

The applicant, the intervening party, or the authorizing official could request a meeting regarding the concerns raised over an application. The request could be made to a designated authority, who could then assign a facilitator. The facilitator would contact the parties and, if the parties agreed, initiate and oversee a discussion aimed at reaching some consensus on the application and concerns in question. A representative of the regulatory agency would be present to provide necessary information on relevant legislative and policy requirements.

If the facilitated process is successful, the facilitator would draft a letter or memorandum of understanding regarding the application, any modifications to it, or conditions that the applicant would meet in conducting the applied-for activity that would satisfy the other party(ies). This memorandum, which could be called a "consensus application", would be signed by the parties and submitted to the official for consideration.

If the facilitated process fails to reach a consensus within a specified period of time, the facilitator would draft a report stating the outstanding points of contention. The report would be signed off by the parties involved, and would be submitted to the official.

The official must take any report into account, but is not bound by it. Where a consensus application is made but not approved, the authorizing official must give written reasons why it cannot be approved.

By this process, the original application may be re-formulated as a "consensus application". This step is new only in that it is not recognized in any of the statutes being considered. In fact, informal collaboration frequently takes place at this stage of licensing or permitting, as regional staff and managers will often try to help resolve conflicts between applicants and intervening parties or between the applicant and the broader public interest. In this context, there are several points worth considering.

Facilitators: Facilitators must be seen as being neutral, be acceptable to the parties involved, and be able to assist parties in finding a common ground. While it is advantageous that the facilitator have some understanding of the technical and policy context involved in the issue, the facilitator's primary role is not to provide expert technical advice but to assist the parties in seeking mutually acceptable solutions. In light of these criteria, There are several possible sources of facilitators:

- *Regional staff:* A member of the applicable MLP regional office, such as the regional director or a staff member could act in this capacity so long as that person was not also responsible for making the license or permit decision. However, MLP staff may still not be viewed as being sufficiently neutral to provide the required objective assistance. As an alternative, MLP could rely on officials from other government offices in the region (e.g., the Regional Director of another provincial department or a municipal official) to bring a neutral perspective, although it is uncertain if the public would see another government official as neutral. Such government staff would likely require some training in facilitation skills.

- *Specialized government service:* The office of the Environmental Appeal Board could be expanded to include staff with the appropriate qualifications and a mandate to assist in collaborative efforts under the environmental statutes. Alternatively, the Ombudsman's Office could take on this role, or a central "mediation office" could be created to service all government agencies with needs for such assistance. However, there is still a risk that any government-based agency would not be viewed as sufficiently neutral by public participants.

- *Private sector:* Trained professionals from the private sector can bring the necessary skill and neutrality to collaborative efforts, but may be viewed as too expensive to use on a regular basis. An alternative is to capitalise on existing volunteer expertise. Many people in British Columbia take courses in negotiation and mediation to further their career or personal development, and seek additional opportunities to use these skills. Local and provincial mediation centres and associations may be able to provide lists of trained people available in different parts of the province.

Incentives: The parties (applicants and intervenors) must perceive some benefit in collaborating as opposed to maintaining their positions and "keep on fighting". The facilitated process would be voluntary, and there are few risks to either party in trying to arrive at a consensus at this stage. The effort to reach agreement on the application may delay its review, but this could be offset by the fact that the application may then be processed more quickly by government officials.

Conversely, there could be risks in not collaborating. From the applicant's perspective, the issuance of the permit or licence may be delayed even longer as regulatory staff consider the concerns of the public; it may even be refused on that basis. Also, if issued, the permit or licence runs a higher probability of being appealed by intervenors who are not consulted. From the perspective of intervening parties, they may miss their best opportunity to influence the outcome of an application.

As an additional, more tangible incentive, regulatory agencies might consider giving consensus-based applications some preference in terms of the speed with which they are reviewed. This would assure the parties that the application will not suffer further delays as a result of attempting to reach agreement.

Role of the regional decision-maker in the consensus process: There is some concern that by taking part in a collaborative effort, the regional manager may compromise his/her decision-making function. In order to maintain objectivity in making a final decision on an application, it has been suggested that the manager <u>not</u> be a party to the collaborative effort. However, some regional managers argue that in many situations, their presence is needed to give the process credibility in the eyes of the disputing parties, as well as to allow them to become fully informed of all sides of an argument.

It is not easy to reconcile these opposing views. The option recommended so far is to have other members of the regional staff present, to inform the collaborative process of applicable legislative and policy requirements and to keep the regional manager informed of progress and opposing views. An additional option is to authorize the manager's participation in the consensus process by legislation, which would circumvent attempts to use the presence of the decision-maker in the consensus process as grounds for an appeal of his/her decision.

Effect of consensus on a final decision: There is some concern that a collaborative process that resulted in consensus on an application would be perceived as binding on the regional manager, thereby "fettering the discretion" of that official in formulating a final decision.

If there is an agreement between the applicant and intervenors, and provided that there is no impediment to its implementation, then it is likely that regional decision-makers would implement the agreement to the extent that they could under the authorizing legislation. However, as discussed in chapter 1, a manager would still exercise his/her legislated power to determine that the resource use being applied for meets all the conditions specified under the applicable statute and its regulations. In summary, the parties to a consensus application might reasonably expect that so long as it met the statutory requirements, the application should be regarded more favourably by an official than the original application made without a consensus basis.

Time and resources: An effort to reach consensus at the application stage could be perceived to "bog down" the application process, frustrate applicants, and create a lot more work for regional staff and resources. There is no evidence to suggest that would be the case, and if it was, there may be several mitigating factors:

- A consensus process would be used in conflict situations only, and not for routine applications. Applications for which no objections are filed or a facilitated meeting is requested would still be handled through the conventional review and approval process. Moreover, a consensus process would be used only if all the parties are agreeable; the facilitator is expected to recommend that no meeting take place if he/she finds one or more parties are unwilling to participate in a meaningful way.

- The extra time and effort at the front end of the permitting/licensing process could be more than offset by savings in time and resources subsequently spent by both government and public members if a decision made without consensus is appealed or if dissatisfaction with a decision leads to civil disobedience.

- There can be significant social benefits achieved over the long term through a collaborative approach - better relations among applicants, intervenors and government authorities, and greater support and adherence to the terms and conditions of a permit or licence.

5. Notice of issuance

The granting of a permit or licence by an official should be made public.

> **Notice should be given to the public of the decision on a permit or licence application. The notice should indicate the substance of the permit/licence.**

The five statutes and their regulations vary in the way in which they treat notice of issuance. The three Regulations in Box 8 require managers to notify persons who submitted objections to the application. The Pesticide Control Act Regulation also requires the permittee to make copies of permits available to the local public.

Again, some consistency in the method for providing notice may be desirable. The Environmental Registry suggested in step 1 (notice of application) would be a logical vehicle for notifying the public that a permit or licence had been issued. Other, more specific forms of notice could be at the discretion of regional officials.

Where an application has been rejected, particularly in the case of a consensus application, officials should be required to give reasons for their decision. These should be noted in the Registry and copies of the decision should be available on request.

6. Right to appeal

Notwithstanding the availability of collaborative processes early in the permitting process, affected parties should still have the right to appeal decisions.

> **There should be a specified time period after a permit, licence or order is issued in which affected parties can appeal it. The effect of an appeal on the decision should be clearly stated.**

The procedures for submitting appeals are specified in the Environmental Appeal Board Procedure Regulation as well as in some of the applicable statutes (Box 9). Usually 30 days are allowed for an appeal of a decision by a designated authority, except for the Waste Management Act which allows only 21 days.

Box 8: Examples of notice of issuance.

Water Regulation: obliges the regional manager or comptroller to notify the objector and the applicant if a hearing will be held in response to objections, and to notify the same parties of the decision resulting from the hearing.

Waste Management Regulation: the manager must serve a copy of his/her decision on the applicant, and notify by mail or public notice all persons who submitted written notices in response to the application. For minor permits, the manager must publish a notice of decision in a local newspaper or in the B.C. Gazette.

Pesticide Control Act Regulation: requires the permittee to make a copy of the permit available to the local public; the permittee may also be required to post the permit in a conspicuous place, to publish it in a local newspaper or in the Gazette, or to provide a copy to any person whose rights may be affected by the permitted use. The administrator is responsible for sending copies to each person who submitted information.

The statutes also vary in terms of who can appeal a decision. The Commercial River Rafting Safety Act is the most restrictive, allowing only applicants who are refused a registration, licence or permit, or holders who have had their registration, licence or permit suspended or cancelled, to appeal. In contrast, "any person" has standing under the Pesticide Control Act (s.15(1)) to appeal. The other environmental statutes refer to persons "aggrieved" by

the decision as having standing to appeal. The Water Act specifies such aggrieved parties as being the licence applicant, other license holders, or an owner of land adjacent to the water body in question whose rights may be prejudicially affected by the licensed use.

Again, there are advantages to making these procedures consistent, in terms of the ease of administration and increased public understanding. Furthermore, in light of the basic principle of public participation advocated at the beginning of this chapter, all members of the public who believe that their rights or interests are affected should have the opportunity to express concerns about a decision. This suggests that the right to appeal should be available to anyone with a legitimate concern.

Box 9: Examples of appeal provisions.

Waste Management Act (s.29): allows 21 days for appeal of a decision; the appeal does not act as a stay unless the Board directs otherwise.

Wildlife Act (s.103) and *Pesticide Control Act* (s.15): allow 30 days for appeal; the appeal does not act as a stay unless the Board directs otherwise.

Water Act (s.38): allows 30 days for appeal; the appeal does not act as a stay.

Commercial River Rafting Act (s.6): an appeal period and the effect of an appeal are not specified.

While the right to appeal should be readily available, it should not be perceived as a procedural opportunity to delay final disposition of a request for a permit or license. To avoid this possibility, it may be desirable to allow the appeal authority to refuse to hear an appeal which it considers to be "frivolous" or "vexatious".

7. Notice of appeal

Notice of an appeal is considered necessary to enable parties who participated in a consensus application to take part in the appeal of a decision made on that basis, and to enable parties who may still have not been aware of the original application to also participate.

If an appeal is filed, notice of the appeal should be given to parties who have participated in a consensus application. More general notification should be at the discretion of the appeal authority.

Again, the Environmental Registry, recommended in step 1, is a logical notice vehicle. Otherwise, the same places that the original application was advertised (e.g., on the site, in local newspapers, etc.) should also be used.

8. Pre-hearing collaboration

A collaborative approach could be revisited at this stage, initiated through a "pre-hearing conference".

A pre-hearing conference, called by the Chairperson of the Environmental Appeal Board, would bring together the appellant(s), respondent and authorizing official or his/her representative. If the appeal involves a permit or licence which was the subject of a consensus application, the parties who participated in that collaborative effort should also be invited to attend. The purpose of the conference would be to define the issues in contention, to explain the hearing process, and to provide an opportunity for the parties to meet directly and discuss their concerns in a neutral setting. In suitable circumstances, the Chairperson could appoint a facilitator to assist the parties in discussing possible settlement of the issues under appeal.

The Environmental Appeal Board has experienced situations where once the parties to an appeal met face to face at a hearing, they were able to find a compromise solution. However, assembling a full hearing of the Board is a rather expensive way of assisting this process. The Board is suggesting new procedural regulations that would allow pre-hearing conferences to be convened, as a more efficient way to prepare for full hearings and to explore collaborative means of resolving appeals.

A mutually agreeable resolution of the issue under appeal could be reached at this stage, either through the pre-hearing conference itself or through a facilitated process initiated at the conference. If so, there are several possible outcomes. If the official is the respondent to the appeal (i.e., his/her decision is being appealed by a permit or licence holder), then that official could simply amend his/her decision to reflect the consensus reached with the appellant. If the appeal involves other parties that are affected by an official's decision (e.g., one resource user is protesting the licensing of or actions of another), then the following avenues are possible:

a) The appeal could simply be withdrawn if the appellant is satisfied that his/her concerns have been or will be dealt with by the respondent.

b) The Board, on application, could adjourn the appeal, to allow time for the parties to go back to the official with a request for an amendment to the permit based on the consensus reached. Should the amendment not be forthcoming, either because of delay on the part of the respondent or refusal by the official, the appellant could ask the Board to set a hearing date for the appeal.

c) The Board could itself amend the permit, licence or order, taking into account the consensus that is reached. However, the current environmental statutes allow the Board to do this only after a full hearing (Table 1); legislative changes would be required to allow it to do so without a full hearing.

There are some points regarding this step that warrant consideration.

Necessity of a second opportunity: There is some question as to the necessity of a second opportunity to collaborate, particularly if a pre-permit consensus process has already occurred. A second attempt at collaboration might be viewed by the appeal respondent as another delay, and by the appellant as a hoop to jump through before appearing before the Board. In this situation, it may be argued that a pre-hearing conference should be limited to defining the grounds for appeal and to exchanging evidence in preparation for a hearing; it should not be aimed at striving for consensus. However, the appellant may not have participated in the pre-permit process, or the necessity of a consensus-based decision may have increased since the first opportunity - these and other factors may provide more than adequate reasons for providing another opportunity to reach consensus.

Facilitating pre-hearing conferences: As with pre-permit collaboration, facilitators could be derived from several sources. One proposal for this particular situation is to have some members of the Board trained to act exclusively as facilitators; other Board members would act as panel members in full appeal hearings. It could be argued that the Board's adjudicatory role would be compromised by donning this collaborative function, particularly in cases where a facilitated process failed to reach a consensus and a hearing is still required. However, there is some experience with this dual mandate. In Washington State, the Board of Industrial Insurance Appeals, comprised of administrative law attorneys, developed procedures that provided for half of the Board members to act as mediators and half as arbitrators. It took several years to work out the rules of operation, but the Board is apparently working well (G. Cormick, personal communication).

Another option is to have staff to the Board act as facilitators. In this way, the Board could initiate a pre-hearing conference and call upon these services without the delays that may occur if it must look elsewhere for facilitators. This would require some expansion in the Board's office to house or retain trained personnel. A third option is to rely on private-sector sources, as discussed for pre-permit collaboration, who might be viewed as being the most neutral.

Time and resources: There is some risk that the parties to the appeal would have to absorb the additional costs and time associated with both a pre-hearing conference and a full hearing, should the former not result in a solution to the appeal. In addition, the Board would have to absorb costs associated with training, staffing, or retaining facilitators. However, a collaborative effort at this stage can avoid the substantial legal costs associated with holding and participating in a full hearing. In addition, collaborative approaches can help to avoid a host of social costs associated with conflicts over resource use, the long-term benefits of which can compensate for additional short-term administrative costs. Even if consensus cannot be reached, a pre-hearing conference can help clarify the issues for the Board, reducing the time and effort spent in a full hearing.

9. Appeal hearing

Should the pre-hearing conference not result in a consensus, the appeal would proceed in its normal course. A full hearing would be held, and the Board would uphold, reject or deny the appeal based on its findings, substituting the decision or recommending amendments to the permit or decision as authorized.

Some Additional Thoughts Regarding A Collaborative Approach to Licensing and Permitting

Of the steps of a collaborative approach proposed in this discussion paper, only two might be considered to be "new" or additional to the current processes: the pre-permit collaboration and pre-hearing conference (Figure 2). The benefits in applying collaborative measures at these points in the licensing/permitting process are many:

- a collaborative approach enhances the opportunity for conflicts to be resolved locally by the parties who are most familiar with the issues;
- it galvanizes the support of both applicants and the public for final decisions regarding permits and licences;
- it helps to promote current government initiatives to improve the quality of public service by increasing the opportunities for public input and showing greater responsiveness to public concerns.

Training

A collaborative approach requires individuals with knowledge of negotiation theory, and skills in negotiation and facilitation, as applicable. Government staff who would be involved in collaborative efforts, and members of the public who might participate often in the processes, would benefit from formal training. Training sessions could be developed specifically to focus on the particular needs of permitting, licensing and other regional decision-making situations, and should be developed to allow the participation of both government staff and members of the public - to begin the process of building trust.

Practicality of the Process

According to Ministry staff, the majority of licence and permit applications are handled at the regional level in a relatively straightforward manner. Only a small proportion of all applications require the type of collaborative approaches envisioned in this chapter. Additional resources may be needed in regional offices to carry out these approaches, but this would be offset by savings in both time and resources spent at the program level in preparing for appeals.

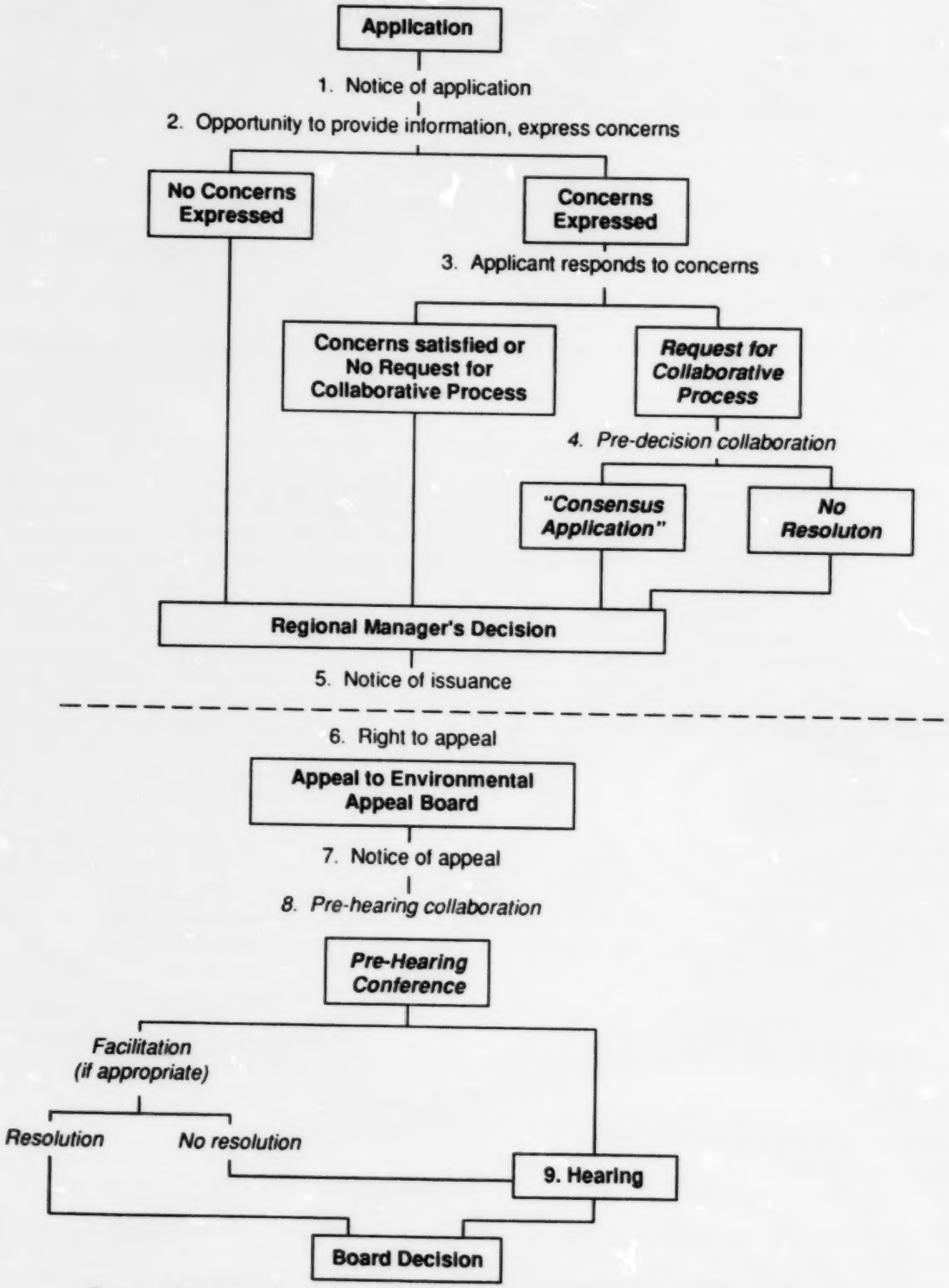
Two Levels of Appeal

As noted earlier, three of the environmental statutes stipulate a two-level appeal process: decisions of regional managers can be appealed to program directors, and the decisions of these directors can then be appealed to the Environmental Appeal Board. This two-level process has the advantage of allowing headquarters staff to review and, if necessary, amend disputed regional decisions in light of additional technical expertise or policy interpretation that can be brought to bear on the matter before it goes before the Board.

However, the two-level appeal process has several disadvantages. It discourages program directors and staff from assisting regional staff with difficult applications, because the program director has an obligation to remain neutral should an appeal of a regional decision be brought to the program level. In addition, confidence and commitment among regional staff are undermined when their efforts are subject to review and reversal by program authorities; this has led to regional decision-making that favours conservative rather than innovative approaches to overcoming conflict situations.

It would be of greater benefit to applicants, decision-makers and the general public if regional decision-makers had the full support of program staff in terms of gathering information, providing technical expertise, and clarifying policy when an application is first made, rather than bringing in this support later to correct a poorly-considered decision. The energies of all staff would be better spent in trying to achieve collaborative solutions to management problems at the front end of decision-making rather than in acting in a quasi-judicial capacity after the fact. These factors argue against a two-level appeal process, and for a stronger initial decision on an application that could then be appealed only to the Environmental Appeal Board.

Figure 2: Collaborative Approach to Licensing and Permitting



(Steps additional to the conventional permitting/licensing process are indicated in italics.)

Consistency of Legislation

From this analysis, it has become apparent that there are a number of areas in which the five statutes are inconsistent with respect to permitting or licensing procedures and the powers of the Environmental Appeal Board. These include:

- the process for giving notice of applications.
- who may submit information or concerns regarding an application.
- how submissions are responded to.
- the process for giving notice of issuance or refusal of a permit or licence.
- who has the right to appeal a decision.
- how much time should be allowed for an appeal.
- whether an appeal acts as a stay of the licence, permit or order being appealed.
- the powers of the Board in deciding on an appeal.

Harmonizing these areas would make permitting and licensing processes more understandable and consistent to the public, would provide useful jurisprudence in other regulatory applications, and would simplify the job of administrators in carrying out their responsibilities under these statutes. Therefore, it is recommended that these aspects of environmental statutes be reviewed with a view to attaining greater consistency.

Records of Facilitated Meetings and Pre-hearing Conferences

The Procedural Regulations of the Environmental Appeal Board require that all proceedings of hearings be recorded. Taped or court-recorder reporting, however, may not be appropriate in a collaboration context, in that it may inhibit a free and open discussion on the part of disputing parties. Such meetings should be considered confidential and "without prejudice" with respect to the positions taken by the parties in further hearings, should such hearings still be necessary.

Other Legislative Changes

This chapter has examined the environmental statutes and regulations only in a cursory fashion; they have not been analysed comprehensively for the legal authority that may be needed, or legal impediments to implementing a collaborative approach. Indeed, the main objective in looking at the five statutes was to illustrate where elements of a collaborative approach already exist rather than to carry out a detailed analysis of what may be missing. Therefore, it may not be possible to implement all of the suggestions in this chapter without amendments to the appropriate legislation.

4. Conclusions - Next Steps

In its most recent report *Towards a Strategy for Sustainability in British Columbia*, the Round Table recommends consensus-based, regional decision-making as a key reform to the present system of government in the province. That report makes it clear that British Columbians are demanding a more substantial role in decision-making - at early stages when issues are being identified and options being formulated, and in processes that deal with a wide range of values.

The Round Table recognizes that consensus processes can greatly assist efforts to achieve sustainability in British Columbia's economy, environment, and social system. When compared to more conventional, authoritative ways of making decisions, the potential benefits of collaborative approaches are many:

- A diversity of expertise and perspectives can be brought together, leading to creativity in problem solving.
- Interests rather than positions are focused on, avoiding the establishment of hardened stances.
- Mutual acceptance can lead to greater commitment to and voluntary compliance with decisions.
- More positive relations, greater understanding, and better communication can be established among divergent interests.
- At a time when public scepticism of government action is increasing, government can be more responsive to public and stakeholder needs through consensus processes, and thereby improve the quality of its services as well as generate support for policies and programs.

For all these reasons, consensus processes can lead to better informed and more long-lasting decisions over the long term. And this can enhance the system for managing the environment, the economy and social system in a sustainable way.

However, the current system of government needs to make some changes if it wishes to incorporate more collaborative approaches in decision-making. These types of approaches are already being used informally within some decision-making contexts. Government must recognize and encourage the application of collaborative approaches where they have met with success, offer some guidance in their application, and provide for the development of expertise to ensure their wider use and greater effectiveness.

These changes require more than lip service. It may mean legislative and regulatory change. It will likely need re-allocation of budgets and human resources to try out new procedures and provide the training needed to change from authoritative to consensus-based decision-making. And in almost all cases, it will require a shift in attitude and approach to the way government does business.

Next Steps

Testing a collaborative approach: In this report, two areas of decision-making - the development of environmental regulations and environmental permitting and licensing -were found to be suitable for applying consensus processes. Government should carefully consider the application of the recommended consensus processes in these areas. For instance, chapter 2 suggested several specific areas (discharge criteria, a forest practices code, and an agricultural wastes management code) for trying out consensus processes in developing standards and regulations. In the realm of environmental permitting and licensing, a pilot project to encourage the use of consensus applications for pesticide-use permits could be implemented and monitored without a major divergence from current regional decision-making procedures or a major re-allocation of resources.

Collaboration in land use planning: There are many other potential areas where collaborative approaches could benefit decision-making. Within the Round Table, the Dispute Resolution Core Group will be working in conjunction with the Sustainable Development Core Group and Land Use Task Force to examine consensus processes

within the realm of land use planning and allocation. As pointed out in *Towards a Strategy for Sustainability in British Columbia*, local round tables can provide an ideal vehicle for applying collaborative approaches in order to reach consensus on the nature and extent of land use, resource development and environmental protection on a local and regional scale. The Core Groups will be looking at this and other collaborative measures in this increasingly important area of decision-making.

Implementing the results of consensus processes - a workshop: In addition to developing more collaborative approaches to decision-making, we must also focus on implementing the results of consensus processes. In applying consensus processes to public policy, government officials need to explore the impact of consensus processes on legislated mandates and discretionary decisions; non-government interests need to know what commitments government will make to ensure that the time and resources devoted to collaborative efforts are worthwhile. What are realistic expectations of a consensus process? Those products by decision-makers? To what extent should the results of a consensus process bind both government and nongovernment parties?

These are some of the questions that could be explored in a workshop on consensus processes and implementation of their results. Background papers could be prepared presenting the perspectives of both government and nongovernment interests and concerns. The Round Table will be discussing the organization of such a workshop with government and nongovernment interests in the near future.

Overall, the Round Table would like to hear more about collaborative efforts being used in communities and localities in British Columbia to reach consensus on issues of concern. The Round Table also wants your opinions regarding the ideas in this report and your comments on better ways of reaching agreement on the environment, economy and society in British Columbia. Please send your comments to:

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References

British Columbia Ministry of Forests. 1991. A Forest Practices Code: a Public Discussion Paper - July 1991.

British Columbia Environmental Network Forest Caucus, Brief to Premier Harcourt, Oct. 29, 1991.

Cormick, G. 1991. Crafting the Language of Consensus. Negotiation Journal October 1991, p.363-368.

Darling, C. 1991. Sustainable Process: the Cornerstone of a Jobs and Environment Accord. Unpublished discussion paper. 3 p.

Dorcey, A.H.J. and C.L. Riek. 1987. "Negotiation-Based Approaches to the Settlement of Environmental Disputes in Canada". In: Canadian Environmental Assessment Research Council, *The Place of Negotiation in EIA Processes: Institutional Considerations*.

Fraser, B. 1991. Multi-stakeholder Involvement in Public Decision-making Processes. Unpublished discussion paper. Salasan Associates Inc. 11 p.

Pritzker, D.M. 1990. Working Together for Better Regulations. *Natural Resources & Environment* 5(2).

Pritzker, D.M. and Dalton, 1990. *Negotiated Rulemaking Sourcebook*. Administrative Conference of the United States.